A **SOUTHERN EMPIRE DEVELOPMENT SDN BHD**

v.

TETUAN SHAHINUDDIN & RANJIT & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-850-2003]
22 JANUARY 2008

C ***PARTNERSHIP:*** *Suits by and against partnership - Liability of firm incurred due to wrongdoings of previous partners - Whether liability ceased once errant partners left partnership - Partnership Act 1961, s. 12*

CIVIL PROCEDURE: *Striking out - Suit against partnership firm - Wrongdoing of previous partners - Whether firm still liable - Whether suit against firm an abuse of court's process - Whether appeal against dismissal of striking out application allowed - Rules of the High Court 1980, O. 18 r. 19; Partnership Act 1961, s. 12*

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This was the 1st defendant firm's appeal against the dismissal of its application to strike out the plaintiff's action pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). The issue was whether the 1st defendant firm should be held liable for the alleged wrongdoing of its partners who had left the firm's partnership prior to the filing of the plaintiff's action.

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F **Held (dismissing the appeal):**

(1) The liability of the firm/partnership is distinct and different from the liability of the firm's partners. It is true that a partnership, being not a human being but merely an artificial legal entity, on its own can do nothing. Therefore on its own it can do no wrong. The partnership acts through its human agency – its partners. Every act or omission of the partners directly pertaining to the partnership is in law deemed to be an act or an omission of the partnership. (para 12)

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(2) The law recognises two types of liability in partnerships, *ie*, the liability of the partners and the liability of the partnership. Section 11 and 19 of the Partnership Act 1961 were irrelevant in the present case as they concerned with the liability of partners. The actual issue herein concerned the liability of the firm or partnership. In that regard, s. 12 of the Act, a

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provision relating to the liability of the firm/partnership itself, should be resorted to. It is true that before any liability can be attributed to a partnership, a wrongful act or wrongful omission (that relates directly to the partnership) must first be committed by a partner. However, there is nothing in s. 12 or anywhere else in the Act that states that the liability of the firm incurred by reason of a wrongdoing of a partner ceases once the errant partner ceases to be a partner of the firm. (paras 13, 14 & 15)

(3) By virtue of s. 12 of the Act, the liability of the firm is distinct from the liability of the partners. Therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. Although the particular errant partner has long left the partnership, the liability of the firm still continues – subject only to any law pertaining to limitation of actions. It followed that, on the hypothesis that the averments in the statement of claim were true, the plaintiff's action against the 1st defendant was not frivolous, vexatious or an abuse of the court's process. (paras 16, 17, 18 & 19)

Case(s) referred to:
Leong Sing v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Another Case [1997] 1 CLJ 307 HC ***(refd)***

Legislation referred to:
Partnership Act 1961, ss. 11, 12, 19(1)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - CF Kuan; M/s RM Abdullah, Kuan & Assocs
For the 1st defendant - T Tharmarajah; M/s Azim Tunku Farik & Wong

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 32 is an appeal by the 1st defendant against the decision of the learned senior assistant registrar who had dismissed the 1st defendant's application to strike out the plaintiff's statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

[2] I have dismissed the appeal with cost and I shall now give my grounds.

[3] The 1st defendant is a legal firm – a partnership. At the material time the 2nd and 3rd defendants were advocates and solicitors and were the only two partners of the firm/partnership.

[4] The material facts largely are not disputed. In June 1997 the plaintiff company, intending to purchase a piece of property from a developer, deposited with the 1st defendant a sum of RM680,000. This money was meant to be a payment of a deposit by the plaintiff in connection with the intended land transaction with the developer; and it was held on trust by the 1st defendant. The 1st defendant, upon receipt of the deposit, was to prepare the sale and purchase agreement to be entered into between the plaintiff/purchaser and the developer/vendor. The 1st defendant was thereafter to pay the deposit to the developer/vendor upon the signing of the sale and purchase agreement by the plaintiff/purchaser and the developer/vendor. The 1st defendant, however, in breach of its professional obligation failed to prepare the sale and purchase agreement. So the plaintiff demanded the return of the deposit money. But the 1st defendant failed to do so. The plaintiff filed the present suit against the 1st defendant and the two partners.

[5] It is the contention of the 1st defendant that the plaintiff's action must be struck out. The argument that is advanced is that the plaintiff, at the time that it filed the present civil suit against the 1st defendant, had ceased to have any reasonable cause of action against the partnership. This is because – so contends the 1st defendant – the partners of the partnership, at the time of the filing of the present action (June 2003), are different from the partners of the partnership at the time of alleged wrongdoing (September/October 1997). In other words, according to the argument of the learned counsel for the 1st defendant, as I understand it, a partnership cannot be responsible for any wrongdoing of its partners who had left the partnership prior to the filing of the action.

[6] Now, at the time of the alleged wrongdoing, the partners of the 1st defendant were the 2nd and 3rd defendants.

[7] However, at the time the present suit was filed (in June 2003 – that is about five and a half years later), the 2nd and 3rd defendants had ceased to be the partners of the partnership. By

then the partnership was made up of different individuals. At the time the present suit was filed, the partners of the partnership were:

(1) Khairul Nizam bin Omar;

(2) Rohana binti Haron; and

(3) Ahmad Mardzuqi bin Mokhtar.

[8] These three individuals had nothing to do with the taking of the deposit and the land transaction of 1997 involving the plaintiff, the firm and the then partners.

[9] The argument of the 1st defendant is that a suit against a partnership is in reality a suit against the partners of the partnership. For this proposition, the learned counsel for the 1st defendant relies on a passage in the judgment of Suriyadi J (as he then was) in *Leong Sing v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Another Case* [1997] 1 CLJ 307 which reads:

> Aside from these statutory provisions, assistance was also sought from case law beginning with *Western National Bank City of New York v. Perez, Triana & Co* [1891] 1 QB 304 where at p 314, Lindley LJ said:
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> > When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

[10] Premised on the proposition as advanced by the 1st defendant, that is, a suit against a partnership is in reality a suit against the current partners, the learned counsel then proceeds to refer to ss. 11 and 19(1) of the Partnership Act 1961. These provisions read:

> **11. Liability of partners**
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> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

19. Liability of incoming and outgoing partners

(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

[11] The 1st defendant then proceeds to argue that based on the above provisions, in particular, sub-s. (1) of s. 19, the present partners cannot be held liable for the alleged wrongdoing of the previous partners; and because the present partners cannot be held liable, therefore, the firm also cannot be liable because the liability of the partnership and the liability of the partners are synonymous.

[12] With respect, I am unable to accept the above argument. In my judgment, the liability of the firm/partnership is distinct and different from the liability of the firm's partners. It is true that a partnership, being not a human being but merely an artificial legal entity, on its own can do nothing. Thus on its own it can do no wrong. The partnership acts through its human agency – its partners. Every act or omissions of the partners directly pertaining to the partnership is in law deemed to be an act or an omission of the partnership. But be that as it may, in relation to partnerships, the law recognizes two types of liability:

(1) the liability of the partners; and

(2) the liability of the partnership.

[13] In my opinion, ss. 11 and 19 are irrelevant because they are concerned with the liability of partners; whereas the actual issue in the present case concerns the liability of the firm or partnership. In this regard, there is another provision of the Partnership Act that we must turn to – a provision that mentions about the liability of the firm/partnership itself – and that is s. 12. This provision reads:

12. Liability of firm for wrongs

Where by any wrongly act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

[14] It is, however, true that before any liability can be attributed to a partnership, a wrongful act or wrongful omission (that relates directly to the partnership) must first be committed by a partner. A

[15] Yet at the same time it is also pertinent to note that there is nothing in s. 12 or, indeed, anywhere else in the Partnership Act that states that the liability of the firm incurred by reason of a wrongdoing of a partner ceases once the errant partner ceases to be a partner of the firm. B

[16] In my view, by virtue of s. 12 above, the liability of the firm is distinct from the liability of the partners. C

[17] In my judgment, because in law the liability of the firm is distinct from that of the partners, therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. Although the particular errant partner has long left the partnership, the liability of the firm still continues – subject only to any law pertaining to limitation of actions. D

[18] This, to my mind, must be the correct interpretation of the law pertaining to partnership; otherwise there will be chaos in the commercial world; for, if the 1st defendant's proposition were to be accepted, then a partnership which has incurred a liability can easily exonerate itself from that liability simply by asking the particular errant partner in question to leave the firm. Surely, this cannot be the law. E F

[19] Hence, on the hypothesis that the averments in the statement of claim are true, the present action by the plaintiff against the firm (that is, the first defendant) cannot be said to be frivolous and vexatious or an abuse of the process of court. For, *prima facie*, the 1st defendant has a legal obligation to return the deposit to the plaintiff. G

[Appeal dismissed with costs.]

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